Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1948

JEAN PAUL MAS and JUDY MAS,
Plaintiffs-Respondents,

versus

OLIVER H. PERRY,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SYLVIA ROBERTS
P. O. Box 3081
Baton Rouge, Louisiana 70821

John L. Avant
DODD, HIRSCH, BARKER, AVANT & WALL
P. O. Box 3778
Baton Rouge, Louisiana 70821

Franklin Press, Inc. Baton Rouge, La.

SUBJECT INDEX

Page

Opinions Below 1

Jurisdictions 2

Questions Presented 2

Statute Involved 3

Statement 3

Reasons for Granting the Writ

I. Relieving Plaintiffs of the Burden of Affirmative Proof of Diversity Constitutes a Fundamental Departure from Decisions of this Court.. 14

II. When No Affirmative Proof of Citizenship Is Offered by Plaintiffs, Dismissal Is Required under the Holdings of this Court 15

III. The Court of Appeals' Fixing of a Mississippi Domicile for Judy Mas Violated this Court's Rule that a Litigant Who has no Definite Intention of Living Elsewhere is Domiciled at the Place of Residence 18

IV. The Conclusive Presumption that Judy Mas could not Acquire a Louisiana Domicile because She was Studying and Working at Louisiana State University conflicts with Decisions of this

Page

Court and other Circuits, and is Constitutionally Defective 20

V. The Court of Appeals Holding that Diversity need not be Complete and that "Ancillary" Jurisdiction can be Applied in Diversity Cases is Erroneous 22

Conclusion 26

Proof of Service 28

Appendix "A" Opinion of the Court of Appeals for the Fifth Circuit 29

Appendix "B" Denial of Petition for Rehearing and Petition for Rehearing en Banc 40

Appendix "C" 28 U.S.C. Sec. 1332 (a) 41

Appendix "D" Ruling of the District Court on Defendant's Motion for Dismissal for failure of plaintiff to establish affirmatively the diversity of citizenship of the parties (App. 160-162, 163) 42

TABLE OF AUTHORITIES

Page

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 17

Anderson v. Papillion, 445 F.2d 841 (5 Cir. 1971) 23

Anderson v. Watts, 138 U.S. 694 (1891) 17, 18

Appelt v. Whitty, 286 F.2d 135 (7 Cir. 1961) 18

Arnold v. Troccoli, 344 F.2d 842 (2 Cir. 1965) 15

Bradbury v. Dennis, 310 F.2d 73 (10 Cir. 1962) cert. den. 372 U.S. 928 (1963) 15

Butler v. Colfelt, 439 F.2d 882 (3 Cir. 1971) 15

Carrington v. Rash, 380 U.S. 80 (1965) 22

Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123 (1886) 21

City of Indianapolis v. Chase Nat. Bank, 314 U.S. 63 (1941) 26

City of Lawton, Oklahoma v. Chapman, 257 F.2d 601 (10 Cir. 1955) 15

Continental Life Ins. Co. of Hartford, Conn. v. Rhoads, Adm'x, etc., 119 U.S. 237 (1886) 16

District of Columbia v. Murphy, 314 U.S. 441 (1941).... 15, 18

Ehrlich v. Van Epps, 428 F.2d 363 (7 Cir. 1970) 18

Page

Ennis v. Smith, 14 How. 400, 423 14 L.Ed. 472 18

Gibbs v. Buck, 307 U.S. 66 (1939) 14

Gilbert v. David, 235 U.S. 569, 570 (1970) 18

Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir. 1970) 15

Healy v. Ratta, 292 U.S. 263 (1933) 15

Hooe v. Jamieson, 166 U.S. 395 (1897) 23

Johnston v. The Cordell National Bank, 421 F.2d 1310 (10 Cir. 1970) 16

Julien c. Sarkes Tarzian, Inc., 352 F.2d 845 (7 Cir. 1965) 21

King Iron Bridge & Manuf'g Co. v. County of Otoe, 120 U.S. 225 (1887) 17

KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936) 14

Lehigh Min. & Manf'g Co. v. Kelly, 160 U.S. 327, 336-7 1895) 14

Lento v. Delaware, Lackwanna & Western Railroad Company, 347 F.2d 113 (2 Cir. 1967) 17

Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co., 174 U.S. 552 (1899) 16

McNello v. Kelly, 283 F.2d 96 (3 Cir. 1960) 18

Page

McNutt v. General Motors Acceptance Corporation, 298 U.S. 178 (1936) 14

McSparran v. Weist, 402 F.2d 867 (3 Cir. 1968) cert. den., 395 U.S. 903 (1969) 15

Miller & Lux v. East Side Canal & I. Co., 211 U.S. 293, 302 (1908) 14, 17

Mitchell v. United States, 88 U.S. (21 Wall.) 350 (1875).... 18

Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290 (1817) 16

Mullen v. Torrance, 22 U.S. (9 Wheat.) 537 (1824) 16

Oppenheim v. Sterling, 368 F.2d 516, 518 (10 Cir. 1966) cert. den., 386 U.S. 516 (1966) 23

Pannill v. Roanoke, 252 F. 910 (W.D. Va. 1918) 18

Quaker State Dyeing & Finish Co. v. ITT Terryphone Corp., 461 F.2d 1140 (3 Cir. 1972) 23

Rosado v. Wyman, 397 U.S. 397 (1970) 25

Rubelt v. Bybee, 229 F.2d 664 (9 Cir. 1956) 17

Russell v. New Amsterdam Casualty Company, 325 F.2d 996 (8 Cir. 1964) 17

St. Paul Mercury Indemnity Co. v. Red Cab, 303 U.S. 283, 288 (1938) 15

Seiler v. Steuben Motors, Inc., 462 F.2d 181 (3 Cir. 1972) 25

Page

Slaughter v. Toye Bros. Yellow Cab Company, 359 F.2d 954 (5 Cir. 1966) 15

Smith v. Sperling, 354 U.S. 91 (1957) 16

State of Texas v. State of Florida, 306 U.S. 398 (1939).... 18

Stiffel v. Hopkins, 477 F.2d 1116, 1123 (6 Cir. 1973) 22

Stine v. Moore, 213 F.2d 44 (5 Cir. 1954) 18

Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).... 13, 23

Sun Printing & Publishing Association v. Edwards, 194 U.S. 377 (1904) 18

Tanzymore v. Bethlehem Steel Corp., 457 F.2d 1320 (3 Cir. 1972) 15

Thomson v. Gaskill, 315 U.S. 442 (1942) 15

United Mine Workers of America v. Gibbs, 383 U.S. 822 (1966) 25

Vlandis v. Kline, 412 U.S. 441 (1973) 93 S.Ct. 2230, 2233 (1973) 3, 21

Welsh v. American Surety Co. of New York, 186 F.2d 16 (5 Cir. 1951) 19

Williams v. Osenton, 232 U.S. 619, 624 (1914) 18

Wilson v. Commercial Securities Company, 429 F.2d 1305 (5 Cir. 1970) 17

SECONDARY AUTHORITIES

Page

Marden, Reshaping Diversity Jurisdiction: A Plea for Study by the Bar, 52 ABA J. 453 (1968) 24

ALI Study of the Division of Jurisdiction between State and Federal Courts (1968) 23

Note, Evolution and Scope of Pendent Jurisdiction, 62 Col. L. Rev. 1018 (1962) 24-25

Currie, the Federal Courts and the American Law Institute pt. 1, 36 U. of Chi. L.Rev. 10 (1968) 24

Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L.Rev. 1232 (1948) 15

Burdich, Diversity under the ALI Proposals: Its Purpose and Its Effect on State and Federal Courts, 48 N.D.L.Rev. 1 (1971) 26

Beale, Proof of Domicile, 74 U. of Pa. L.Rev. 552, 560, 562 (1926) 18

Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 398 (1936).. 25

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

JEAN PAUL MAS and JUDY MAS,
Plaintiffs-Respondents,
versus
OLIVER H. PERRY,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Oliver B. Perry, petitioner, erroneously designated "Oliver H. Perry" herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

This case was tried to a jury resulting in a verdict in favor of plaintiffs, and against petitioner, in the amount of

$15,000.00 in favor of Judy Mas, and $5,000.00 in favor of Jean Paul Mas; the District Court entered judgment in accordance therewith without written opinion. Following petitioner's appeal, the judgment was affirmed by the United States Court of Appeals for the Fifth Circuit, and is reported at 489 F.2d 1396 5th Cir. 1974) (Appendix "A," infra, pp. 29-39). The ruling of the District Court on jurisdiction is included as Appendix "D," infra, pp. 42-44.

JURISDICTION

The denial of the Petition for Rehearing and Petition for Rehearing en Banc was entered April 3, 1974, and is reported at 492 F.2d 1242 (5th Cir. 1974) (Appendix "B," infra, p. 40). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Is there not a presumption against federal jurisdiction in a suit invoking 28 U.S.C. Sec. 1332 as its sole jurisdictional base?

2. Once defendant challenges the jurisdiction of the court under 28 U.S.C. Sec. 1332 on grounds citizenship of all parties is not in fact diverse, is not the burden of proving complete diversity by affirmative, postive evidence imposed on plaintiffs?

3. If the record is silent herein as to Mrs. Mas being a citizen of any particular state, did the court have jurisdiction based on diversity?

4. When Mrs. Mas lived in Louisiana continuously for at least fifteen months prior to filing suit, and she testified she did not intend to return to her former domicile in Mississippi can the Court of Appeals nonetheless presume she retained a domicile in Mississippi?

5. Can the Court of Appeals presume Mrs. Mas retained a domicile in Mississippi because she was student and graduate assistant in Louisiana and thus lacked the requisite intention to be a Louisiana citizen without indulging in an irrebutable presumption similar to that nullified in *Vlandis v. Kline*, 412 N.S. 441 (1973)?

6. In a suit alleging jurisdiction based on diversity alone, must diversity of the parties be complete?

7. If there is not complete diversity among the parties in a suit based on diversity jurisdiction alone, can the doctrine of pendent or ancillary jurisdiction be extended to confer jurisdiction of the federal court over the non-diverse plaintiff's claim?

STATUTE INVOLVED

28 U.S.C. Sec. 1332(a).

STATEMENT

The fundamental, and far reaching errors of the decision of the Court of Appeals in this case, fracturing the very bed rock of federal jurisdiction based on diversity, call into question rulings of this Court which have remained inviolate for

"Q. And you continued to reside in Baton Rouge how long after that, ma'am?

"A. After the marriage?

"Q. Yes, Ma'am.

"A. Maybe two years, I am not at all sure. I believe it was two years.

"Q. When you did move, when you left Baton Rouge, you went to Chicago?

"A. When did we move?

"Q. I say when you left Baton Rouge you went to Chicago.

"A. We went to Park Ridge.

"Q. Well, Park Ridge, Illinois?

"A. Yes, sir.

"Q. And that was temporary, your intention at that time was to return to Baton Rouge, this September, is that correct?

"A. Not really. We thought we may return to Baton Rouge, but we might stay in Park Ridge. We were not sure.

"Q. And the fact is that you do and you are returning to Baton Rouge in September?

"A. That's correct.

"Q. **For an indefinite stay?**

"A. Yes, sir." (Emphasis supplied; App. pp. 154-156.)

On re-direct, plaintiffs' counsel addressed this question to Judy Mas:

"Q. While you were here in Baton Rouge in 1970 and '71, at LSU, were you a student as well as a part-time teacher?

"A. Yes, sir.

"Q. Were you required to pay non-resident tuition?

"MR. AVANT: Just a moment, just a moment. I object to the relevancy.

"THE COURT: Gentlemen, if you are getting to the jurisdiction, there is no question about what (sic) this court has jurisdiction. But in order to get it straight on the record, this is a pertinent question:

"Did you pay non-resident tuition at LSU?

"A. I paid no tuition." (App. p. 158.)

No further questions were posed by plaintiffs' counsel with respect to Judy Mas' domicile, or any factual matters disclosing business, social or any other type of connections she might have with any state. Immediately after Mrs. Mas was excused from the witness stand, defendant's attorney moved for dismissal for failure of the plaintiffs to establish affirmatively jurisdiction of the court under ". . . diversity of citizenship jurisdiction, insofar as the Plaintiff Judy Mas is concerned . . ." (App. p. 160).

"THE COURT: Yes, I realize that. So the record is protected, but I fiind that the facts in this case clearly establish that this Court does have jurisdiction over the person and has clearly established that the jurisdictional amount is well pleaded and is involved." (Emphasis supplied: App. 163) (Appendix "D," pp. 42-44)

Defendant renewed the motion to dismiss for failure to establish the requisite jurisdiction after the jury retired, which motion was again denied (App. 217-218).

On appeal, the reviewing court was confronted with a record absolutely bereft of positive testimony or evidence of any kind demonstrating where Judy Mas was domiciled at the time suit was filed. What had been shown by discovery and questions of defendant's counsel, was that she had resided, studied and worked in Louisiana over one year prior to filing suit, and that she had no intention of returning to Mississippi. The dearth of positive evidence was conceded by plaintiffs' counsel, who attributed their failure to go forward with proof to the ruling of the trial court that jurisdiction was present.[3]

Because it is well settled that federal courts have no power to hear cases based on 28 U.S.C. 1332 (a) unless affirmative proof of diversity is made out by plaintiff, dismissal was the only judgment that could properly have been entered by the Court of Appeal under these circumstances. Instead

---

[3] Plaintiffs' brief on appeal stated quite candidly:
"Clearly, had the [trial] Court not felt and expressed the opinion and finding that the Court had jurisdiction, Mrs. Mas was prepared to go further, but such was not deemed necessary by the trial court." (Plaintiffs-appellees' Original Brief, p. 7)

Plaintiffs opined that any error in failure to prove diversity should be assessed to the lower court:

"If an error was made, it was in the [court's] cutting off counsel..." (Plaintiffs-appellees' Original Brief, p. 9)

of following the multitude of controlling decisions of this Court, the appellate court chose to presume jurisdiction was present by supplying Judy Mas with a domicile. The task was achieved by proceeding to analyze the three domiciles Mrs. Mas might conceivably have, without the benefit of affirmative proof about any of them except Louisiana. French citizenship arising out of her marriage to a citizen of France was first examined. This was discarded with the observation that she would then be unable to ". . . invoke the alienage jurisdiction to bring her claim in federal court, since she is not an alien." (Appendix "A," p. 37)[4]

The next possibility was that she was a citizen of Louisiana, but that two would have the same result of precluding her from suing in federal court as the court noted in this portion of its opinion:

> "On the other hand, if Mrs. Mas' domicile were Louisiana, she would become a Louisiana citizen for diversity purposes and could not bring suit with her husband against appellant, also a Louisiana citizen, on the basis of diversity jurisdiction. These are curious results under a rule arising from the theoretical identity of person and interest of the married couple . . ." (Appendix "A," p. 37)

To fill the vacuum of where Judy Mas was domiciled, the court selected Mississippi, which permitted diversity jurisdiction to be upheld. Beyond any contest, three very serious defects in this formulation appear; first; Mrs. Mas disavowed any

---

[4] The court stated that there was no precedent for extending the concept of the wife taking the citizenship of her husband in the event the husband is a foreign citizen residing in this country. In addition, the court noted that "An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 8 U.S.C. Sec. 1489." (Appendix "A," p. 37)

intention to return to her former domicile in Mississippi; second, there were no facts to indicate physical presence in Mississippi while there was physical presence and employment in Louisiana for at least one year prior to filing suit; third, there was no evidence that Judy Mas maintained any connections whatsoever with the state of Mississippi at the time suit was filed. The court dealt with these incongruent facts by positing a general, conclusive presumption that the sole fact Judy Mas studied and was employed at Louisiana State University prevented her from being a citizen of Louisiana:

> "Mrs. Mas' Mississippi domicile was disturbed neither by her year in Louisiana prior to her marriage nor as a result of the time she and her husband spent at LSU after their marriage, since for both periods she was a graduate assistant at LSU. See Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886). Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not effect a change of domicile since she and Mr. Mas were in Louisiana only as student and lacked the requisite intention to remain there. See Hendry v. Masonite Corp., 5 Cir., 1972, 455 F.2d 955, cert. denied, 409 U.S. 1023, 93 S.Ct. 464, 34 L.Ed. 2d 315." (Appendix "A," p. 37)

This holding is of great significance, for it says what no court has ever said before: classes of persons who are students and graduate assistants[5] are incapable, as a matter of law, of forming an intent to establish a domicile in the state where they are pursuing an education. The fact that neither of the

---

[5] This finding omits the employment of Judy Mas as a part-time teacher at a Baton Rouge parochial school from September, 1970, to May, 1971, a fact contained in her answers to interrogatories (App. p. 15).

two cases cited in support of this extreme statement stand for such a proposition will be discussed infra, at pp. 20-22.

The impression that the Court may entertain some doubts as to the defensibility of its fixing of a Mississippi domicile for Judy Mas is strengthened by the concluding paragraph of the opinion. At that point, the court affirms the notion of "ancillary" jurisdiction of the District Court (Appendix "D," p. 43), as an antidote to a fatal jurisdictional defect should Judy Mas actually be a Louisiana citizen:

> "We also note, however, the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant. See ALI Study of the Division of Jurisdiction Between State and Federal Courts, pt. I, at 9-10. (Official Draft 1965.) In the case before us, such a result is particularly desirable. The claims of Mr. and Mrs. Mas arise from the same operative facts, and there was almost complete interdependence between their claims with respect to the proof required and the issues raised at trial. Thus, since the district court had jurisdiction of Mr. Mas's action, sound judicial administration miltates strongly in favor of federal jurisdiction of Mrs. Mas's claim." (Appendix "A," p. 39)

The error of adhering to never-adopted proposals for changing diversity jurisdiction, repudiated by legal scholars and the House of Delegates of the American Bar Association, in preference to the long line of cases commencing with *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) requiring complete diversity, will be discussed below at pp. 23-24.

REASONS FOR GRANTING THE WRIT

I. RELIEVING PLAINTIFFS OF THE BURDEN OF AFFIRMATIVE PROOF OF DIVERSITY CONSTITUTES A FUNDAMENTAL DEPARTURE FROM DECISIONS OF THIS COURT.

The District Court's ruling that plaintiffs were not required to prove diversity, and that mere allegations would suffice (Appendix "D," pp. 42-44) is squarely opposed to this Court's presumption against federal jurisdiction in such cases, *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293,302 (1908); *Lehigh Min. & Manf'g. Co. v. Kelly*, 160 U.S. 327, 336-7 (1895), and in particular to *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936); *Gibbs v. Buck*, 307 U.S. 66 (1939), which require the plaintiff to make out the facts establishing jurisdiction:

> "The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so chanlenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."
>
> *McNutt v. General Motors Acceptance Corporation*, 238 U.S. at p. 189.

The action of the Court of Appeals for the Fifth Circuit

in leaving the error of the District Court undisturbed, is at odds with *McNutt*, other decisions of this court, those of other circuits, and even its own previous decisions.[6] Further, the holding undermines this Court's strict construction of 28 U.S.C. Sec. 1332, *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Healy v. Ratta*, 292 U.S. 263 (1933), as well as its consistent policy of implementation of the ". . . intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states . . ." *St. Paul Mercury Indemnity Co. v. Red Cab*, 303 U.S. 283, 288 (1938).

II. WHEN NO AFFIRMATIVE PROOF OF CITIZENSHIP IS OFFERED BY PLAINTIFFS, DISMISSAL IS REQUIRED UNDER THE HOLDINGS OF THIS COURT.

The brief record in this one day trial reveals nothing with respect to Judy Mas' connections with the State of Mississippi at the time suit was filed which proved her to be a citizen of that state.[7] Plaintiffs' counsel readily conceded such proof was not offered due to the favorable ruling by the District Court that jurisdiction based on diversity was present.[8] Had there been such evidence, there would have been no need for the Court of Appeals to presume jurisdiction existed through retention of Mississippi citizenship by Judy Mas, by

---

[6] *Tanzymore v. Bethlehem Steel Corp.*, 457 F.2d 1320 (3d Cir. 1972); *Butler v. Colfelt*, 439 F.2d 882 (3d Cir. 1971); *Haynes v. James H. Carr, Inc.*, 427 F.2d 700 (4th Cir. 1970); *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968) cert. den., 395 U.S. 903 (1969); *Slaughter v. Toye Bros. Yellow Cab Company*, 359 F.2d 954 (5th Cir. 1966); *Arnold v. Troccoli*, 344 F.2d 842 (2d Cir. 1965); *Bradbury v. Dennis*, 310 F.2d 73 (10th Cir. 1962), cert. den. 372 U.S. 928 (1963); *City of Lawton, Oklahoma v. Chapman*, 257 F.2d 601 (10th Cir. 1955).

[7] *District of Columbia v. Murphy*, 314 U.S. 441 (1941) discusses the pertinent factors to be considered; see also, Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232 (1948).

[8] See footnote 3, *supra*.

operation of law, based on its legal conclusion that Judy Mas could not have changed her domicile to Louisiana where she was studying and working.

Presuming jurisdiction is present, as was done by the Court of Appeals, it is in direct contravention of the black letter law of this Court requiring affirmative proof. As stated in *Continental Life Ins. Co. of Hartford, Conn. v. Rhoads, Adm'x, etc.*, 119 U.S. 237 (1886), ". . . the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively." The instant case contained negative circumstances, such as Judy Mas' intention not to return to Mississippi, which somehow was translated into a positive basis for holding she had not changed that domicile. Another example of the Court of Appeals' use of negative evidence was its observation that testimony concerning Judy Mas' move to Illinois approximately one year after filing suit was ". . . of interest insofar as it supports their lack of intent to remain permanently in Louisiana." (Appendix "A," p. 38.) In addition to the drawback such evidence has relative to its negative character, such consideration of events subsequent to the filing of suit has been repudiated by this court in *Smith v. Sperling*, 354 U.S. 91 (1957); *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat.) 290 (1817); and was viewed as reversible error by the Tenth Circuit in *Johnston v. The Cordell National Bank*, 421 F.2d 1310 (10th Cir. 1970).[9] It should be noted that once the Court of Appeals had embarked on considering subsequent events, it failed to take into account Mr.

[9] Since the court acknowledged the prevailing rule that it is the citizenship at the time suit is filed that is determinative of diversity jurisdiction, *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899); *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824), Appendix "A," p. 35, inquiry into subsequent events is especially difficult to comprehend.

and Mrs. Mas' return to Louisiana again after the Illinois sojourn. When asked about her intention to remain in Louisiana following the return from Illinois, Mrs. Mas testified they would return to Louisiana for an ". . . indefinite stay . . ." (App. p. 156). There is no testimony that at the time of filing suit Judy Mas intended to go to Illinois at all.

One searches the Court of Appeals' opinion in vain for one shred of positive, affirmative evidence as to the domicile of Judy Mas at the time suit was filed. Under these circumtances, dismissal is inevitable, *Miller & Lux v. East Side Canal & I. Co., supra*; *Anderson v. Watts*, 138 U.S. 694 (1891); *King Iron Bridge & Manuf'g Co. v. County of Otoe*, 120 U.S. 225 (1887); *Wilson v. Commercial Securities Company*, 429 F.2d 1305 (5th Cir. 1970); *Lento v. Delaware, Lackawanna & Western Railroad Company*, 374 F.2d 113 (2d Cir. 1967); *Russell v. New Amsterdam Casualty Company*, 325 F.2d 996 (8th Cir. 1964); *Rubelt v. Bybee*, 229 F.2d 664 (9th Cir. 1956). The compelling reason for such result is explained in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951) wherein a judgment was annulled for lack of diversity jurisdiction in a removal case:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."

It is submitted that the Court of Appeals' affirmance of the creation of diversity jurisdiction where none was shown

to exist marks an untoward departure from the entrenched jurisprudence and should be reversed.

III. THE COURT OF APPEALS' FIXING OF A MISSISSIPPI DOMICILE FOR JUDY MAS VIOLATED THIS COURT'S RULE THAT A LITIGANT WHO HAS NO DEFINITE INTENTION OF LIVING ELSEWHERE IS DOMICILED AT THE PLACE OF RESIDENCE.

Petitioner contends that the fundamental error of the Court of Appeal was in failing to dismiss when no affirmative proof of diverse citizenship was made manifest. There was no authority for the Court to proceed to determine a domicile.[10] And even in its determination of a domicile, the court fell into error.

This court has held that "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. *Ennis v. Smith*, 14 How. 400, 423, 14 L.Ed. 472; *Anderson v. Watt*, 138 U.S. 694, 706, 11 S.Ct. 449, 452, 34 L.Ed. 1078." *District of Columbia v. Murphy*, 314 U.S. 441 454, 455 (1941). Moreover, where there is physical presence and no intention to be domiciled elsewhere, the place of residence is the domicile, *Williams v. Osenton*, 232 U.S. 619, 624 (1914).[11] The facts herein are exactly that: Judy Mas' physical

---

[10] The situation in diversity cases wherein the plaintiff must affirmatively prove domicile (citizenship) or suffer dismissal, must be distinguished from cases in which the court is obligated to determine domicile in one of several states in which there were connections of various kinds in order to resolve the question of which is the proper state to receive taxes owed, *State of Texas v. State of Florida*, 306 U.S. 398 (1939).

[11] In *Gilbert v. David*, 235 U.S. 569, 570 (1970), this court applied this rule to a plaintiff who testified he had some intention of returning to a previous domicile:

"But, as we have seen, a floating intention of that kind was not

presence in Louisiana for more than one year prior to filing suit, absolutely no testimony that she intended to be domiciled elsewhere; in addition, her testimony that she did not intend to return to Mississippi is contradicted by no other evidence.

Not only did the Court of Appeals ignore the dictates of these cases, it cited as purported authority for its holding of a Mississippi domicile for Judy Mas, three decisions which in no manner supported its conclusion: *Sun Printing & Publishing Association v. Edwards*, 194 U.S. 377 (1904); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350 (1875); *Welsh v. American Surety Co. of New York*, 186 F.2d 16 (5th Cir. 1951). In each of these cases there was evidence regarding plaintiff's connection to a former domicile shown by facts adduced, while in the instant case, there is no testimony regarding Judy Mas' connections with her former domicile of Mississippi, only her stated intention not to return there.[12] Although the question of diversity of citizenship was not in-

---

enough to prevent the new place, under the circumstances shown, from becoming his domicile. **It was his place of abode, which he had no present intention of changing; that is the essence of domicile."**

See also *Ehrlich v. Van Epps*, 428 F.2d 363 (7th Cir. 1970); *Appelt v. Whitty*, 286 F.2d 135 (7th Cir. 135 (1961); *McNello v. Kelly*, 283 F.2d 96 (3d Cir. 1960); *Stine v. Moore*, 213 F.2d 44 (5th Cir. 1954); *Pannill v. Roanoke*, 252 F. 910 (W.D. Va. 1918). Beale, Proof of Domicile, 74 U. of Pa. L. Rev. 552, 560, 562 (1926).

[12] In *Sun Printing*, plaintiff's positive assertion that he was a New York citizen entitled to sue a Delaware defendant was deemed nullified by his testimony that his family lived in Delaware and he went back and forth from New York to Delaware; [Judy Mas at no time gave such testimony]; in *Mitchell*, there was nothing to show the litigant had any other intention but to return to his former domicile, and it would have been illegal for him to have taken up an abode in the Confederate states; [Judy Mas testified she did not intend to return to Mississippi, and it was not illegal for her to be a Louisiana domiciliary]; in *Welsh*, plaintiff left his home state of Texas two months before suit was filed, and announced to a witness that his purpose in movng to New Mexico was to file suit in federal court against a Texas defendant.

volved in *Mitchell*, the result in *Sun Printing* and *Welsh* was to find that no change to a new domicile had occurred as plaintiffs asserted; thus diversity jurisdiction was absent. These cases are perfectly consistent with this Court's restrictive view of diversity jurisdiction and requirement of affirmative proof of diverse citizenship. It would appear to be a perversion of these holdings to cite them as authority for the Court of Appeals' supplying a domicile on the basis of circumstances showing a domicile in no particular state.

IV. THE CONCLUSIVE PRESUMPTION THAT JUDY MAS COULD NOT ACQUIRE A LOUISIANA DOMICILE BECAUSE SHE WAS STUDYING AND WORKING AT LOUISIANA STATE UNIVERSITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, AND IS CONSTITUTIONALLY DEFECTIVE.

The Court of Appeals refused to find a Louisiana domicile for Judy Mas since as a student she ". . . lacked the requisite intention to remain there. See *Hendry v. Masonite Corp.*, 5 Cir. 1972, 455 F.2d 955, cert. denied, 409 U.S. 1023, 93 S.Ct. 464, 34 L.Ed.2d 315." (Appendix "A," p. 37.) It should be pointed out at the outset that *Hendry* had nothing to do with a student, but did involve a finding of no jurisdiction based on diversity where the litigant, opposing removal to federal court of his state court suit, showed numerous factual connections to the state in which he claimed citizenship. A more divergent fact situation as presented by *Hendry*, compared with that of Judy Mas, could scarcely be imagined.

A reading of the Court of Appeals' decision would lead one to believe that there is no means by which a person pursuing an education in a state different from a former domicile

can establish a domicile where he studies and lives. Precisely the reverse is true. For example, this Court in *Chicago & Northwestern Railway Co. v. Ohle*, 117 U.S. 123 (1886), upheld submitting to the jury the question of the plaintiff's intent in leaving his family home in Iowa to establish a domicile in Illinois where he was attending school. The jury's determination that plaintiff had actually become a citizen of Illinois had the effect of permitting plaintiff to sue an Iowa citizen under the diversity jurisdiction of the court was approved by this Court.[13] See also, *Johnston v. The Cordell, National Bank, supra*; *Julien v. Sarkes Tarzian, Inc.*, 352 F.2d 845 (7th Cir. 1965), [no diversity jurisdiction found where plaintiff sued Indiana residents while pursuing graduate studies in that state despite her claim of "legal residency" in her birth state of Connecticut].

What has transpired in the instant case is the imposition of a presumption of a Mississippi domicile, which must be properly classified an irrebutable since it yielded to neither Judy Mas' own testimony that she did not intend to return to Mississippi, nor to facts of her physical residence and employment in Louisiana. Just such a conclusive presumption by a state statute of non-residency of students studying in Connecticut has been struck down by this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973). 93 S.Ct. 2230, 2233 (1973):

---

[13] A portion of the charge to the jury reads as follows:

"The fact that he then went to Janesville [Illinois] to complete his education would not more defeat his citizenship in Illinois than it would defeat his citizenship in Iowa if he had still retained that citizenship. It then remains for you to determine the object and intent that he then had."

Id., at p. 127. In contrast to Ohle's positive testimony he intended to be domiciled in Illinois, we have only negative testimony of no intention to be domiciled in Mississippi herein by Judy Mas.

> "Statutes cteating permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments."

It is submitted that a similar conclusive presumption indulged in by the Court of Appeals is no less obnoxious to the Constitution, and the judgment based thereon should be reversed.[14]

V. THE COURT OF APPEALS HOLDING THAT DIVERSITY NEED NOT BE COMPLETE AND THAT 'ANCILLARY' JURISDICTION CAN BE APPLIED IN DIVERSITY CASES IS ERRONEOUS.

While the Court of Appeals assumed Judy Mas was a citizen of Mississippi without any proof of intention or connections with that state, it is apparent that some doubt lingered as to the correctness of that determination. This uncertainy is reflected in the opinion's concluding paragraph:

> "We also note, however, the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant. *See* ALI Study of the Division of Jurisdiction Between State and Federal Courts, pt. I, at 9-10. (Official Draft 1965.) In the case before us, such a result is particularly desirable. The claims of Mr. and Mrs. Mas arise from the same operative facts, and there was almost complete interdependence between their claims with respect to the proof required and the issues raised at trial. Thus, since the district court

[14] In *Stiffel v. Hopkins*, 477 F.2d 1116, 1123 (6th Cir. 1973) the court questioned automatic classification of noncitizenship of students, and raised the issue of constitutional infirmities of such classifications as applied to particular classes of citizens, citing *Carrington v. Rash*, 380 U.S. 80 (1965), *Id.*, at p. 1125.

had jurisdiction of Mr. Mas's action, sound judicial administration militates strongly in favor of federal jurisdiction of Mrs. Mas's claim." (Appendix "A," p. 39)

There would have been no need, or any relevance, of such a statement if in fact complete diversity existed as the court had purportedly held.[15]

Moreover, the authority cited by the Court of Appeals, the ALI Study, can in no way overwhelm *Strawbridge*, 7 U.S. (3 Cranch) 267 (1806), and its numerous progeny. The proposal was described by ALI as one which ". . . extends beyond 'ancillary' or derivative claims [and] is limited to claims arising out of the same transaction and brought by or on behalf of members of the same family or household . . ." *ALI Study of the Division of Jurisdiction between State and Federal Courts*, promulgated by ALI (1968), at p. 122. Unquestionably the proposal was a departure from the controlling jurisprudence, as noted in this portion of the Study:

". . . it has generally been held that when A has a claim against C within the diversity jurisdiction of federal courts a claim brought by or on behalf of B, which is itself not within the diversity jurisdiction, cannot be joined no mat-

---

[15] As the Court of Appeals acknowledged,

"It has long been the general rule that complete diversity of parties is required in order that diversity jurisdiction obtain; that is no party on one side may be a citizen of the same State as any party on the otheer side. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch), 267 2 L.Ed. 435 (1806); see cases cited in 1 W. Barron & A. Holtzoff, Federal Practice and Procedure §26, at 145 n. 95 (Wright ed. 1960)." Appendix "A," p. 35.

See also *Hooe v. Jamieson*, 166 U.S. 395 (1897); *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140 (3d Cir. 1972); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir. 1971); *Oppenheim v. Sterling*, 368 F.2d 516, 518 (10th Cir. 1966) cert. denied, 386 U.S. 516 (1966).

ter how close the relationship between the claims of A and B, or between plaintiffs themselves . . ." (*Id.*, at p. 121.)

The proposals were never adopted and, as pointed out by Mr. Orison S. Marden in his article Reshaping Diversity Jurisdiction: A Plea for Study by the Bar, 52 ABA J. 453, 455 (1968), considerable criticism was registered against the proposals. The House of Delegates of the American Bar Association rejected them in 1968, *Id.* at 455 n.25.

Among the critics was Professor Curriex, whose remarks have special relevance to the case at bar:

> "But when a dispute between two Pennsylvanians is joined to a dispute over which there is jurisdiction only because of diversity, the assumption underlying *Strawbridge* tells us there is no need for federal jurisdiction even of the diverse claim. Judicial economy can be served, without substantial risk of bias, by a single suit on both claims in a state court. I cannot agree that family cases are so special that *Strawbridge* should be relaxed for them alone, especially when such ambiguous criteria define the exception."
>
> Currie, The Federal Courts and the American Law Institute (pt. 1), 36 U. of Chi. L. Rev. 10, at p. 21 (1968).

As for the extension of ancillary or pendent jurisdiction, this would mean a revolutionary new approach in the construction of 28 U.S.C. Sec. 1332. Heretofore legal scholars have carefully separated out diversity cases, to which these doctrines do not apply, and federal question litigation arising under 28 U.S.C. Sec. 1331, to which pendent production has been applied. Note, Evolution and Scope of Pendent Jurisdic-

tion, 62 Col. L. Rev. 1018, 1019; 1023 (1962); Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 398 (1936). Note, 74 Harv. L. Rev. 1660 (1961). The circumstance of applying such a theory to a diversity case must be distinguished from this Court's recognition of pendent state claims in a case based on federal question jurisdiction, *Rosado v. Wyman*, 397 U.S. 39 (1970) and *United Mine Workers of America v. Gibbs*, 383 U.S. 822 (1966). This distinction is emphasized in *Seyler v. Steuben Motors, Inc.*, 462 F.2d 181 (3d Cir. 1972), wherein the engrafting of pendent jurisdiction to strictly diversity cases was rejected in this manner:

> "In this diversity action the district court found that plaintiff-appellants and Steuben Motors, Inc., one of the two named defendants, were citizens of Pennsylvania, thus destroying the requirement of 'complete diversity' necessitated by *Strawbridge v. Curtiss*, 3 Cranch. (7 U.S.) 267, 2 L.Ed. 435 (1806). See 1 Moore's Federal Practice ¶ 0.60 [8.—4]. The finding by the court that Steuben's principal place of business was in York, Pennsylvania, was not clearly erroneous.
>
> "Appellants' reliance on the doctrines of pendent or ancillary jurisdiction is misplaced. This is ont a commingling of a state claim with one based on a federal question, *United Mine Workers of America v. Gibbs*, 383 U.S. 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); nor do the claims come within the ambit of *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3d Cir. 1964). *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966), and *Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968), also relied upon by appellant, dealt with amounts in controversy and not the doctrine of complete diversity." (*Id.*, at pp. 181-182.)

CONCLUSION

The implications of the holding of the Court of Appeals are serious and far reaching. Basic concepts of the interpretation of 28 U.S.C. Sec. 1332, operative in other Circuits, and mandated by decisions of this Court, are no longer binding on litigants within the territorial limits of the Court of Appeals for the Fifth Circuit. Plaintiffs can now merely allege jurisdiction, and be relieved of producing affirmative, positive proof. When citizenship of one of the plaintiffs is not shown, the appellate court will not reverse, but will presume jurisdiction in a state in which the litigant testifies she does not intend to return. Non-diverse party plaintiff claims will be tried in federal court thus opening the door still wider to ". . . 'business that intrinsically belongs to the state courts' . . .," *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63, 76 (1941).

There appears to be no way to justify the Court of Appeals' reference to, but then turning away, from ancient principles, both from the standpoint of obedience to *stare decisis*, and in terms of this Court's concern with the ever escalating case load of the federal courts.[16]

Petitioner prays that the Court grant a Writ of Certiorari, to the United States Court of Appeals herein, and reverse the

---

[16] The steady increase of diversity cases is shown by the totals of 20,174 for Fiscal year 1964; 21,009 for Fiscal year 1968; and 22,954 for Fiscal year 1970, [Burdick, Diversity Under the ALI Proposals; Its Purpose and Its Effect on State and Federal Courts, 48 N.D. L.Rev. 1, 7-10 (1971)].

erroneous judgment below summarily, as being beyond the diversity jurisdiction of the District Court.

Respectfully submitted,

SYLVIA ROBERTS
P. O. Box 3081
Baton Rouge, Louisiana 70821

John L. Avant
DODD, HIRSCH, BARKER, AVANT & WALL
P. O. Box 3778
Baton Rouge, Louisiana 70821

PAGES MISSING

amount was lacking, and that requisite jurisdictional amount was in controversy in such action.

Affirmed.

1. Courts—308(1)

Complete diversity of parties is required in order that diversity jurisdiction obtain, that is, no party on one side may be a citizen of same state as any party on other side. 28 U.S.C.A. § 1332.

2. Courts—361(5)

Determination of one's state citizenship for diversity purposes is controlled by federal law, not by law of any state. 28 U.S.C.A. § 1332.

3. Courts—307.1(2)

In order that diversity jurisdiction obtain, diverse citizenship among adverse parties must be present at time complaint is filed. 28 U.S.C.A. § 1332.

4. Courts—319

Federal diversity jurisdiction is unaffected by changes in citizenship of parties after complaint has been filed. 28 U.S.C.A. § 1332.

5. Courts—322(1), 323

Burden of pleading diverse citizenship is upon party invoking federal diversity jurisdiction; if diversity jurisdiction is properly challenged, that party also bears the burden of proof.

6. Courts—307.1(2)

To be a citizen of a state within statute governing federal diversity jurisdiction, a natural person must be both a citizen of the United States and a domiciliary of that state. 28 U.S.C.A. § 1332.

7. Courts—307.1(2)

For diversity purposes, "citizenship" means domicile; mere residence in state is not sufficient. 28 U.S.C.A. § 1332.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts—307.1.(2)

A person's "domicile" is, for diversity purposes, the place of his true, fixed, and permanent home and principal establishment, and to which he has intention of returning whenever he is absent therefrom. 28 U.S.C.A. § 1332.

See publication Words and Phrases for other judicial constructions and definitions.

9. Courts—307.1(2)

A change of domicile may be effected for diversity purposes by taking up residence in a different domicile with the intention to remain there. 28 U.S.C.A. § 1332.

10. Courts—307.1(2)

General rule that domicile of wife and, consequently, her state citizenship for purposes of diversity jurisdiction is that of her husband was not applicable where husband was a citizen of a foreign country, but resided in United States. 28 U.S.C.A. § 1332.

11. Citizens—15

An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 28 U.S.C.A. § 1332; Immigration and Nationality Act, § 357, 8 U.S.C.A. § 1489.

12. Courts—307.1(2)

For purposes of diversity jurisdiction, a woman does not have her domicile or state citizenship changed solely by reason of her marriage to an alien. 28 U.S.C.A. § 1332;; Immigration and Nationality Act, § 357, 2 U.S.C.A. § 1489.

to their marriage, Mr. and Mrs. Mas were graduate assistants, pursuing coursework as well as performing teaching duties, for approximately nine months and one year, respectively, at Louisiana State University in Baton Rouge, Louisiana. Shortly after their marriage, they returned to Baton Rouge to resume their duties as graduate assistants at LSU. They remained in Baton Rouge for approximately two more years, after which they moved to Park Ridge, Illinois. At the time of the trial in this case, it was their intention to return to Baton Rouge while Mr. Mas finished his studies for the degree of Doctor of Philosophy. Mr. and Mrs. Mas were undecided as to where they would reside after that.

Upon their return to Baton Rouge after their marriage, appellees rented an apartment from appellant Oliver H. Perry, a citizen of Louisiana. This appeal arises from a final judgment entered on a jury verdict awarding $5,000 to Mr. Mas and $15,000 to Mrs. Mas for damages incurred by them as a result of the discovery that their bedroom and bathroom contained "two-way" mirrors and that they had been watched through them by the appellant during three of the first four months of their marriage.

At the close of the appellees' case at trial, appellant made an oral motion to dismiss for lack of jurisdiction.[1] The motion was denied by the district court. Before this Court, appellant challenges the final judgment below solely on jurisdictional grounds, contending that appellees failed to prove diversity of citizenship among the parties and that the requisite jurisdictional amount is lacking with respect to Mr. Mas. Finding no merit to these contentions, we affirm. Under section 1332(a)(2), the federal judicial power extends to the claim of Mr. Mas, a citizen of France, against the appellant, a citizen

---

1. The motion was actually made just prior to the testimony of appellees' last witness, but for purposes of the record counsel stipulated and the court approved that the motion would be considered to have been made at the close of appellees' case.

of Louisiana. Since we conclude that Mrs. Mas is a citizen of Mississippi for diversity purposes, the district court also properly had jurisdiction under section 1332(a)(1) of her claim.

[1-5] It has long been the general rule that complete diversity of parties is required in order that diversity jurisdiction obtain; that is, no party on one side may be a citizen of the same State as any party on the other side. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); *see* cases cited in 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 26, at 145 n. 95 (Wright ed. 1960). This determination of one's State citizenship for diversity purposes is controlled by federal law, not by the law of any State. 1 J. Moore, Moore's Federal Practice ¶ 0.74[1], at 707.1 (1972). As is the case in other areas of federal jurisdiction, the diverse citizenship among adverse parties must be present at the time the complaint is filed. Mullen v. Torrance, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154, 155 (1824); Slaughter v. Toye Bros. Yellow Cab Co., 5 Cir., 1966, 359 F.2d 954, 956. Jurisdiction is unaffected by subsequent changes in the citizenship of the parties. Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 297, 4 L.Ed. 242, 244 (1817); Clarke v. Mathewson, 37 U.S. (12 Pet.) 164, 171, 9 L.Ed. 1041, 1044 (1838); Smith v. Sperling, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1113 n. 1, 1 L.Ed.2d 1205 (1957). The burden of pleading the diverse citizenship is upon the party invoking federal jurisdiction, *see* Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132 (1888); and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); Welsh v. American Surety Co. of New York, 5 Cir., 1951, 186 F.2d 16, 17.

[6, 7] To be a citizen of a State within the meaning of section 1332, a natural person must be both a citizen of the United States, & Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 383, 24 S.Ct. 696, 698, 48 L.Ed. 1027

(1904); U.S.Const. amend. XIV, § 1, and a domiciliary of that State. *See* Williamson v. Osenton, 232 U.S. 619, 624, 34 S.Ct. 442, 58 L.Ed. 758 (1914); Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448. For diversity purposes, citizenship means domicile; mere residence in the State is not sufficient. *See* Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389, 13 S.Ct. 602, 37 L.Ed. 493 (1893); Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448.

[8, 9] A person's domicile is the place of "his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom . . . ." Stine v. Moore, 5 Cir., 1954, 213 F.2d 446, 448. A change of domicile may be effected only by a combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there. Mitchell v. United States, 88 U.S. (21 Wall.) 350, 22 L.Ed. 584 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 24 S.Ct. 696, 48 L.Ed. 1027 (1904).

[10] It is clear that at the time for her marriage, Mrs. Mas was a domiciliary of the State of Mississippi. While it is generally the case that the domicile of the wife—and, consequently, her State citizenship for purposes of diversity jurisdiction—is deemed to be that of her husband, 1 J. Moore, Moore's Federal Practice ¶ 0.74 [6.—1], at 708.51 (1972), we find no precedent for extending this concept to the situation here, in which the husband is a citizen of a foreign state but resides in the United States. Indeed, such a fiction would work absurd results on the facts before us. If Mr. Mas were considered a domiciliary of France—as he would be since he had lived in Louisiana as a student-teaching assistant prior to filing this suit, *see* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886); Bell v. Milsak, W.D.La., 1952, 106 F.Supp. 219—then Mrs. Mas would also be deemed a domiciliary, and thus, fictionally at least, a citizen of France. She would not be a citizen of any State and could not sue in a federal court on that basis; nor could she

invoke the alienage jurisdiction to bring her claim in federal court, since she is not an alien. *See* W. Wright, Federal Courts 80 (1970). On the other hand, if Mrs. Mas's domicile were Louisiana, she would become a Louisiana citizen for diversity purposes and could not bring suit with her husband against appellant, also a Louisiana citizen, on the basis of diversity jurisdiction. These are curious results under a rule arising from the theoretical identity of person and interest of the married couple. *See* Linscott v. Linscott, S.D.Iowa, 1951, 98 F.Supp. 802, 804; Juneau v. Juneau, 227 La. 921, 80 So.2d 864, 867 (1954).

[11, 12] An American woman is not deemed to have lost her United States citizenship solely by reason of her marriage to an alien. 8 U.S.C. § 1489. Similarly, we conclude that for diversity purposes a woman does not have her domicile or State citizenship changed solely by reason of her marriage to an alien.

[13, 14] Mrs. Mas's Mississippi domicile was disturbed neither by her year in Louisiana prior to her marriage nor as a result of the time she and her husband spent at LSU after their marriage, since for both periods she was a graduate assistant at LSU. *See* Chicago & Northwestern Railway Co. v. Ohle, 117 U.S. 123, 6 S.Ct. 632, 29 L.Ed. 837 (1886). Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not effect a change of domicile since she and Mr. Mas were in Louisiana only as students and lacked the requisite intention to remain there. *See* Hendry v. Masonite Corp., 5 Cir., 1972, 455 F.2d 955, cert. denied, 409 U.S.. 1023, 93 S.Ct. 464, 34 L.Ed.2d 315. Until she acquires a new domicile, she remains a domiciliary, and thus a citizen, of Mississippi. *See* Mitchell v. United States, 88 U.S. (21 Wall.) 350, 352, 22 L.Ed. 584, 587-588 (1875); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 383, 24 S.Ct. 696, 698, 48 L.Ed. 1027

(1904); Welsh v. American Security Co. of New York, 5 Cir., 1951, 186 F.2d 16, 17.[2]

Appellant also contends that Mr. Mas's claim should have been dismissed for failure to establish the requisite jurisdictional amount for diversity cases of more than $10,000. In their complaint Mr. and Mrs. Mas alleged that they had each been damaged in the amount of $100,000. As we have noted, Mr. Mas ultimately recovered $5,000.

[15-18] It is well settled that the amount in controversy is determined by the amount claimed by the plaintiff in good faith. KVOS, Inc. v. Associated Press, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183 (1936); 1 J. Moore, Moore's Federal Practice ¶ 0.92 [1] (1972). Federal jurisdiction is not lost because a judgment of less than the jurisdictional amount is awarded. Jones v. Landry, 5 Cir., 1967, 387 F.2d 102; C. Wright, Federal Courts 111 (1970). That Mr. Mas recovered only $5,000 is, therefore, not compelling. As the Supreme Court stated in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288—290, 58 S.Ct. 586, 590-591, 82 L.Ed. 845:

> [T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith.
>
> It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of the plaintiff to recover an

---

2. The original complaint in this case was filed within several days of Mr. and Mrs. Mas's realization that they had been watched through the mirrors, quite some time before they moved to Park Ridge, Illinois. Because the district court's jurisdiction is not affected by actions of the parties subsequent to the commencement of the suit, *see* C. Wright, Federal Courts 93 (1970), page 35 *supra*, the testimony concerning Mr. and Mrs. Mas's moves after that time is not determinative of the issue of diverse citizenship, though it is of interest insofar as it supports their lack of intent to remain permanently in Louisiana.

> amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. . . .
>
> . . . His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit.

Having heard the evidence presented at the trial, the district court concluded that the appellees properly met the requirements of section 1332 with respect to jurisdictional amount. Upon examination of the record in this case, we are also satisfied that the requisite amount was in controversy. *See* Jones v. Landry, 5 Cir., 1967, 387 F.2d 102.

[19, 20] Thus the power of the federal district court to entertain the claims of appellees in this case stands on two separate legs of diversity jurisdiction: a claim by an alien against a State citizen; and an action between citizens of different States. We also note, however, the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant. *See* ALI Study of the Division of Jurisdiction Between State and Federal Courts, pt. I, at 9-10. (Official Draft 1965). In the case before us, such a result is particularly desirable. The claims of Mr. and Mrs. Mas arise from the same operative facts, and there was almost complete interdependence between their claims with respect to the proof required and the issues raised at trial. Thus, since the district court had jurisdiction of Mr. Mas's action, sound judicial administration militates strongly in favor of federal jurisdiction of Mrs. Mas's claim.

Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC
(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Panel Decision Citation of
GROUP 1			
I. S. Joseph Company, Inc. v. Citrus Feed Company, Inc.	72-3561	4/3/74	M.D.Fla., 490 F.2d 185
Mas v. Perry	73-3008	4/3/74	M.D.La., 489 F.2d 1396
N.L.R.B. v. Boatel, Incorporated	73-3086	4/3/74	N.L.R.B., La., 490 F.2d 990
National Lawyers Guild, University of Texas Chapter v. Board of Regents of University of Texas System	73-1623	4/4/74	W.D.Tex., 490 F.2d 97
U. S. v. New Orleans Book Mart, Inc.	71-2594	4/3/74	E.D.La., 490 F.2d 73
U. S. v. Sulaiman	71-3145	4/3/74	S.D.Fla., 490 F.2d 78
U. S. v. Thevis	72-2664	4/3/74	E.D.La., 490 F.2d 76
GROUP 2			
U. S. v. Windsor	72-3526	4/2/74	M.D.Fla., 488 F.2d 1364

APPENDIX "C"

28 U.S.C. Sec. 1332 (a):

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

APPENDIX "D"

Ruling of the District Court on Defendant's Motion for Dismissal for Failure to Establish Affirmatively the Diversity of Citizenship of the Parties. (App. 160-163)

"The COURT: Well, of course, the motion obviously must be denied. First of all there is no question about the jurisdiction. The petitioners' complaint does state proper jurisdiction and that is what is required, as long as they state the jurisdiction, the burden is upon the defendant to prove that it does not exist, after it is stated and not denied.

"It is not denied in any way.

"And secondly, I doubt seriously that the defendant could, in any way, deny it if he tried, for the simple reason the evidence is quite clear the Plaintiff has given his address—I mean the Defendant has given his address as East Baton Rouge Parish, the other people, one is a citizen of France, and I certainly have jurisdiction over his action, and as far as Mrs. Mas is concerned, the evidence is very clear that she is from out of state, she was temporarily in the state as a student and a teacher.

"Now, jurisdiction does not depend on residency, jurisdiction depends on domicile.

"One of the last questions she was asked was whether or not she intended, when she went to Park Ridge, Illinois, did she intend to come back to Louisiana to live and she said they did not have any definite intention to come back to Louisiana to live, but they thought they might have stayed in Park Ridge, Illinois. Obviously, as you well know, domicile, which is the basis for citizenship for the purpose of jurisdiction is predicated not only where a person lives, but where they intend to make their permanent home. There has been

no indication that there was any intention to make Baton Rouge their permanent home. And there is the allegation in the complaint that they are residents of France and Mississippi, respectively, and that is sufficient.

"Then I might add one other thing, that even if, for any reason, it was decided that Judy Mas was a resident of Louisiana—it is hard for me to think that she can be a resident of any place other than her husband—if she was a citizen here and for that reason the Court might not have jurisdiction, I would assume jurisdiction anyway, ancillary jurisdiction to the case of her husband, her husband being obviously a non-resident—a non-citizen of the State of Louisiana. I would consider her jurisdiction as ancillary, and in any event, the motion in that respect, of course, will be denied.

"Insofar as the jurisdictional amount is concerned, the jurisdictional amount in a case like this there is no way to establish the jurisdictional amount other than to allege it. And the jurisdictional amount has been alleged as to both defendants. The question as to whether or not more than ten thousand dollars is involved is a matter for the jury. The jury can give much more than the jurisdictional amount if they saw fit and I would not reverse it if they did.

"If the jury gave much less than the jurisdictional amount, I would not reverse it if they did. So there obviously is the proper allegation made both as to the citizenship and as to jurisdictional amounts. So the motion will be denied.

"MR. AVANT: May it please the Court, it is not my intention to argue with the Court, of course, but, for the benefit of the record, I would like to correct something that I feel your Honor stated that perhaps your Honor was unaware of.

"The first defense in the answer to the complaint is that

this honorable court is without jurisdiction over the subject matter of this litigation.

"The COURT: Oh, that is a normal thing that everybody puts in every answer.

"MR. AVANT: Also that the allegation as to the diversity of citizenship is denied in the answer.

"THE COURT: Yes, but as I say, that is just as normal as putting your name at the end of it. I have never seen one yet where it is not denied.

"MR. AVANT: I specifically raised that in the Pre-trial order.

"THE COURT: Yes, I realize that. So the record is protected, but I find that the facts in this case clearly establish that this Court does have jurisdiction over the person and has clearly established that the jurisdictional amount is well pleaded and is involved.

"MR. AVANT: All right, thank you."